

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA) Case No. 23 CR 546
)
v.)
)
ANTHONY MONTGOMERY-WILSON and)
PRESTON POWELL,) Chicago, Illinois
) July 30, 2025
Defendants.) 11:04 a.m.

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT ON MOTION TO SEVER
BEFORE THE HONORABLE THOMAS M. DURKIN

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PROCEEDINGS REPORTED BY STENOTYPE
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1 (Proceedings heard in open court; defendants present:)

2 THE CLERK: This is Case No. 23 CR 546, United States
3 v. Montgomery-Wilson and Powell.

4 May I please ask the attorneys present on behalf of
5 the United States to state their names.

6 MR. JULIEN: Good morning, Your Honor. Jason Julien
7 and Jared Jodrey for the United States.

8 THE CLERK: And for Mr. Montgomery-Wilson.

9 MR. SPIELFOGEL: Good morning, Your Honor.
10 Keith Spielfogel, and Darryl Goldberg will be here shortly,
11 Your Honor, on behalf of --

12 THE COURT: Do you want to wait for him?

13 MR. SPIELFOGEL: No. I actually spoke to him
14 yesterday and he said that we should begin.

15 THE COURT: Okay.

16 THE CLERK: All right. And for Mr. Powell.

17 MS. BLAINE: Good morning, Your Honor. Holly Blaine
18 and Molly Armour and Michael Pod- -- Podgurski on behalf of
19 Mr. Powell.

20 THE COURT: All right. And the defendants are both
21 present in court.

22 All right. There was a motion for severance filed by
23 Defendant Powell, objected to by the government, and then a
24 reply brief was filed in support of severance. I had -- the
25 government asked for oral argument and that's what we're here

1 today for.

2 So how do you want to proceed? Have you talked about
3 it?

4 MR. JULIEN: We haven't.

5 THE COURT: You haven't. Okay.

6 MR. JULIEN: It's their motion, Judge.

7 THE COURT: It's their motion so they should go first.
8 And happy to hear the argument.

9 MS. ARMOUR: Thank you, Your Honor.

10 THE COURT: And you can do it from -- seated or you
11 can come up to the podium, whatever you prefer.

12 MS. ARMOUR: This is fine, Your Honor.

13 THE COURT: Okay.

14 MS. ARMOUR: So to begin, we believe that it is not
15 possible to admit the alleged statement of
16 Mr. Montgomery-Wilson and to have Mr. Powell be in the same
17 trial or face that evidence without the ability to
18 cross-examine him. That would -- would result, undoubtedly, in
19 a trial that would not be fair to Mr. Powell. We have advanced
20 a number of different bases that we believe support our request
21 for severance in this matter.

22 We, of course, begin with the confrontation clause and
23 the Sixth Amendment right that that guarantees. It is our
24 belief and our position that the government's perspective on
25 the admissibility of this statement would basically --

1 essentially gut the protections that the confrontation clause
2 afford it.

3 If this exception is allowed to proceed in this case,
4 it would essentially swallow the entire right, the exception
5 would swallow the right because there will -- and this is
6 our -- our best guess, that Mr. Powell, undoubtedly, not be
7 able to cross-examine the purported maker of that statement, he
8 will be unable to effectively challenge this evidence in front
9 of the jury and will effect -- effectively have to sit silently
10 by while the -- while this evidence is admitted.

11 THE COURT: Yeah, you won't know if you can
12 cross-examine literally until the defense case. I mean, the
13 odds are most defendants don't testify, but we don't know.
14 Every defendant has a right to, but your point is at a joint
15 trial you would hope he testifies so you can cross-examine him.
16 If he doesn't, the only person you can cross-examine would be
17 the person who made the tape.

18 MS. ARMOUR: That is correct. And by that point in a
19 trial what we are challenged by if we waited until the point of
20 a defense case is that statement would've already been admitted
21 by the government, and that is a bell that cannot be unrung.
22 It is overwhelmingly prejudicial.

23 THE COURT: Mr. Spielfogel, can you guarantee your
24 client's going to testify at trial?

25 MR. SPIELFOGEL: Absolutely not, Judge.

1 THE COURT: Okay. Make sure you're in front of a mic.

2 MR. SPIELFOGEL: Oh, I'm sorry.

3 Certainly not, Judge.

4 THE COURT: All right. Go ahead.

5 MS. ARMOUR: Because of such, this evidence would be
6 admitted against Mr. Powell. I think the government, you know,
7 spends -- spent a lot of time in its response setting forth the
8 evidence that they believe was elucidated and comparing it to
9 other points of evidence, but nevertheless, it's -- it -- this
10 is not a statement where Mr. Powell is not referenced. The
11 nickname Marley is referenced repeatedly in this statement.

12 Perhaps we would be facing a different scenario had
13 the codefendant never been mentioned, had a name never been
14 uttered. But nevertheless, by doing that, by implicating him
15 in this incredibly serious offense, he spreads the blame. He
16 shares the blame for what occurred with Mr. Powell, and he
17 draws him in to that -- to -- to his statement in that regard.

18 And, you know, we do not believe that the case law
19 with regard to the confrontation clause is nearly as
20 straightforward as the government believes. And, you know, we
21 don't need to -- to, you know, relitigate everything that we
22 set forth in our reply and in our opening motion that highlight
23 the various issues that we think are there.

24 Number one, the issue of whether or not the statement
25 is testimonial. We don't believe that is. That's far from

1 settled law. And even if it was a testimonial statement, we
2 don't believe that's dispositive. We --

3 THE COURT: Why? Give me the reasons why it's not
4 dispositive if it is testimonial.

5 MS. ARMOUR: Because -- and -- and that relies on the
6 Supreme Court's own statements that -- that testimonial is not
7 the end of the analysis, that they -- the cases that were
8 presented before the Court that we have available to us to
9 analyze this issue explicitly say this -- we are not intending
10 to issue this opinion excluding all other potentialities. We
11 are only addressing the facts of these cases, and there are
12 potential -- you know, paraphrasing -- there are potential
13 other scenarios in which, you know, a nontestimonial statement
14 could present an issue under the same constitutional issue.

15 So that's why we believe that even if it is dispo- --
16 if -- even if it is testimonial, it is not dispositive of the
17 issue, and that is not a settled issue before the
18 Supreme Court, and they took great pains to explain that they
19 were not making a declarative statement that only testimonial
20 statements were what was at issue. They say it is a primary
21 concern, but they explicitly said it is not the sole concern of
22 the Sixth Amendment.

23 THE COURT: How does the *Lilly* case support your
24 position?

25 MS. ARMOUR: Well, the *Lilly* case talks about

1 really -- really I think supports it because they challenge so
2 much the inherent unreliability of a statement such as this
3 being admitted and they go through a number of different
4 scenarios of potential statements but admitted against someone
5 who is not the maker of the statement. And it is highly
6 unlikely, *Lilly* says, that such evidence could be effectively
7 rebutted if admitted.

8 And I think that, you know, it -- as to evidence that
9 is used to establish the guilt of an alleged accomplice, that
10 that is one of the categories that they are most concerned of,
11 and that's what we're dealing with here. And as we talked
12 about, you know, the Seventh Circuit's very bare bones analyses
13 in different contexts of the *Lilly* case, the *Lilly* case
14 actually went out of its way to express great concern about
15 reliability here.

16 And we also believe that the statement was not
17 reliable. And we can't effectively challenge that reliability
18 because the maker we fully expect not to testify, and some of
19 those reasons are the facts surrounding the making of the
20 statement are very different from some of those Seventh Circuit
21 cases interpreting *Lilly*.

22 Number one here, the statement, the alleged statement,
23 was not made to a coconspirator as it was in *Watson*, as it was
24 in *Volpendesto*. In this case, it is to basically a government
25 agent, a government informant, that has been wired up with the

1 purpose of obtaining this statement. And in that --

2 THE COURT: Was the person who recorded the statement
3 an inmate who -- or was it an actual third party, not an
4 inmate, brought in specifically for this purpose? Do you know?

5 MS. ARMOUR: We -- we fully believe it is an inmate of
6 the institution that the government recruited.

7 THE COURT: Okay.

8 MS. ARMOUR: But the government can speak most adept
9 to those facts.

10 THE COURT: Well, address that when you come up.
11 But go ahead.

12 MS. ARMOUR: So unlike in *Watson* or unlike in
13 *Volpendesto*, the statements were not made to someone who was a
14 part of this case, who you would expect to share secret
15 confidences with in the same kind of manner. *Watson* involved a
16 coconspirator who was also in a romantic relationship with the
17 maker of the statement. And those two layered factors would
18 tend to lend some level of reliability to the statement.
19 You're speaking to some -- a loved one and you're speaking to
20 someone who's part and parcel of the crime.

21 As for *Volpendesto*, that person was a coconspirator.
22 So that was someone who was also involved in the underlying
23 offense itself.

24 This -- in this case, this statement was made I
25 believe over a year after the shooting and murder occurred, and

1 it was made to someone shortly after Mr. Montgomery-Wilson
2 arrived at this institution, an institution that at the time
3 that he arrived there had a very well-known reputation for
4 violence and for danger, and we documented some of that in our
5 opening brief. And I think as physically evident and as we
6 related from the discovery materials we have, with all respect
7 to Mr. Montgomery-Wilson, he's a relatively small individual.
8 And coming into a new penal institution serving an Illinois
9 Department of Corrections sentence, it is absolutely a normal
10 thing to create luster, to try and create some sort of
11 reputation that protects you safely and --

12 THE COURT: Wouldn't --

13 MS. ARMOUR: -- engenders people to protect you.

14 THE COURT: -- wouldn't that involve his own conduct
15 rather than another person's, though? If he's trying to boast,
16 talk about, you know, being a killer, why involve a third
17 person -- a second person? Why not just talk about his own
18 activities?

19 MS. ARMOUR: That's a question I would love to be able
20 to ask to Mr. Montgomery-Wilson, but again, that's not
21 something that we're going to be able to challenge or confront
22 or parse out with him. I -- you know, I -- some of that may go
23 to street reputation. I can't speak to what was in his mind or
24 how -- why he involved him, but I think that it is clear that
25 he did. And that spreading of the blame I think puts us

1 squarely, again, within the kinds of concern that the
2 Supreme Court raised when we deal with a statement like this,
3 which should be treated as inherently unreliable precisely
4 because he is bringing someone else into it.

5 So whether we look at it from the context of the
6 confrontation clause and spreading the blame or if we look at
7 it -- it from another context of, you know, well, why was he
8 able to make any -- that kind of statement, in either way,
9 Mr. Powell is hamstrung in an ability to challenge that
10 evidence if it is admitted.

11 THE COURT: Assuming I -- if I were to find it to be
12 testimonial, what is the basis to keep it out otherwise? Well,
13 let me ask a different question. I -- from what I saw, I don't
14 know how this can be redacted without a jury assuming it's the
15 codefendant who's named there, but maybe this is more for the
16 government when you get up, but I -- you know, typically in
17 cases like this, sometimes there's a redaction. I don't know
18 why there -- how that would work here. We're not -- I've
19 already said we're not going to do two juries. It's either
20 a -- one trial with two defendants or two trials with one
21 defendant each, but we're not going to do two juries. It's
22 just not workable I think the way we've got things set up here.

23 Is there a basis to redact this in any way without --
24 where -- and would the government even want to redact it?
25 Again, you can answer that. But is there a basis to redact it

1 where your client is not implicated if you take out his
2 nickname and just include nothing but Mr. Montgomery-Wilson's
3 statements where he implicates himself?

4 MS. ARMOUR: I think in this case no. Perhaps if we
5 were sitting at trial with six other potential codefendants and
6 there might be a question of who the alleged maker of that
7 statement is, that might be a different scenario. Those are
8 not the facts we have here. There will be two defendants if
9 this trial's unsevered sitting at counsel table. And the
10 jury -- and the government's entire theory of the case will be
11 presented, two shooters will appear on their surveillance
12 video. There is only one answer as to who else was present
13 that day, and the jury will only answer that as Mr. Powell. So
14 I -- I believe that answer is no.

15 THE COURT: All right. So, again, if I find it to be
16 testimonial, we're past confrontation clause, maybe, but what
17 is the other basis by which I could deny the -- or grant the
18 motion to sever?

19 MS. ARMOUR: So we do believe under the rules of
20 severance themselves, and we outline that in our opening
21 motion, as well as addressing a little bit in our reply, permit
22 this Court to sever, and, you know, some of that analysis is
23 based on the lack of reliability. But fundamentally, the rules
24 on joinder and severance allow this Court to consider the
25 context of the whole, and if it is unfair and has, you know,

1 basically appears, I believe is the phraseology that is
2 specifically in the severance rule in Rule 14, to prejudice
3 either party, it should not -- you know, that is a basis for
4 severance.

5 THE COURT: And I'd like the government to address
6 that --

7 MS. ARMOUR: And that's at page 5.

8 THE COURT: -- because there's a lot of back and forth
9 about whether this is testimonial or not, and certainly, it's a
10 statement against interest by Mr. Montgomery-William --
11 Mr. Montgomery-Wilson, but there's no question it's a statement
12 against his interest. He's saying on tape he killed the guy.
13 But the real question is, in my mind, at least, is under
14 Rule 14 where it's a pretty broad issue of prejudice to a
15 defendant.

16 And again, you'll get your chance, but something to
17 address.

18 Go ahead.

19 MS. ARMOUR: So -- and -- and this is something in our
20 opening motion, you know, we spent most of our time addressing
21 the confrontation clause issues, but we reference the
22 guarantees of -- of due process, which incorporates
23 fundamentally the right to a fair trial.

24 And we address that more in our reply, and I -- the
25 appears to prejudice language that comes from the -- the -- I'm

1 sorry -- the Rule 14, the severance rule, for us, that
2 prejudice is clear and apparent. It would -- it would clearly
3 appear to touch upon Mr. Powell's right to a fair trial, and
4 that prejudice is enormous.

5 I also just want to take a moment just to highlight
6 that given all of the -- and we -- we talked about this in our
7 reply, but given all the evidence that the government has
8 outlined in its motion, we think the prejudice for, you know,
9 granting severance, or in the alternative, excluding the
10 statement against the government is minimal because they went
11 through and outlined all of this evidence that they would have
12 absent the statement to prove their case.

13 On the other hand, the prejudice to Mr. Powell is
14 overwhelming. There is just no way for this statement to come
15 in against him and not have the jury understand and fully
16 believe that that relates to Mr. Powell and there is no way to
17 effectively rebut that evidence.

18 We -- we cited a -- a quotation about just
19 the importance of cross-examination and elucidating the truth.
20 And that tool, that tool to somehow level the playing field
21 against this prejudicial evidence is not something that we will
22 have available. And so in analyzing what the -- a prejudice is
23 here, we think the prejudice is great to Mr. Powell and the
24 prejudice to the government is minimal.

25 And then, finally, if the Court finds that it cannot

1 sever this case, and we do believe that the Court has broad
2 discretion to -- to sever, if the Court does not believe that
3 that is an appropriate remedy or that it cannot sever, there is
4 still Rule 403, which allows for the exclusion of the evidence,
5 and we believe that that would be appropriate if severance is
6 not.

7 And that would essentially -- and given all the
8 evidence the government has set forth ably, we believe that
9 there -- the prejudice to the government would be minimal, the
10 probative value of the evidence minimal, again in light of the
11 other evidence that is available in this case to the
12 government. And again, the prejudice to Mr. Powell is
13 extraordinary.

14 THE COURT: All right. Thank you.

15 Your point is if you're going to try it -- I take it
16 you have no objection to a joint trial if the tape's not
17 played.

18 MS. ARMOUR: Correct.

19 THE COURT: Okay. Because they're properly joined as
20 defendants, at least under Rule 8.

21 MS. ARMOUR: We would agree with that.

22 THE COURT: Okay. Anything else?

23 MS. ARMOUR: No, Your Honor.

24 THE COURT: Okay. Anything that counsel for
25 Mr. Montgomery-Wilson wants to add?

1 MR. SPIELFOGEL: We have nothing to add to that,
2 Your Honor.

3 THE COURT: Okay. I'll hear from the government.

4 MR. JULIEN: There a couple of things. I just want to
5 address your questions before I -- I get going --

6 THE COURT: Sure.

7 MR. JULIEN: -- in -- in responding to the arguments.

8 The informant was an inmate in IDOC. He hadn't been
9 in that specific facility for a long time. He was brought into
10 that facility and then moved out of that facility, but had been
11 in IDOC generally within --

12 THE COURT: Okay.

13 MR. JULIEN: -- the system for a while.

14 THE COURT: Is he expected to be a witness at trial --

15 MR. JULIEN: He will be.

16 THE COURT: -- to authenticate the tape?

17 MR. JULIEN: Well, I guess it depends. If -- if we
18 are talking about the tape's in and he's got to come in and
19 provide some -- you know, authenticate --

20 THE COURT: Sure.

21 MR. JULIEN: -- what happened, then yes, we would be
22 calling him.

23 Certainly, in a trial against Mr. Montgomery-Wilson,
24 we were planning to call him. So their position would be in a
25 trial against Mr. Powell, we wouldn't call him because he's

1 really just talking about the recording, but we plan to call
2 him.

3 THE COURT: Okay.

4 MR. JULIEN: The other -- to your point about
5 redacting the recording, we would like the opportunity,
6 depending on what the ruling is, to assess, you know, how we
7 would do that, and if we would do that, what that would look
8 like. It may be the case that it's possible to redact a
9 recording. He's talking about Mr. Montgomery-Wilson and a
10 number of individuals on the recording. And certainly, when
11 he's talking about, you know, the crux of the murder itself,
12 he's really only talking about Mr. Powell, but he's talking
13 about another act of violence that he committed days prior that
14 we think is relevant to Count 3, the felon-in-possession
15 charge.

16 THE COURT: Was Mr. Powell involved in that one?

17 MR. JULIEN: No --

18 THE COURT: Okay.

19 MR. JULIEN: -- he was not.

20 He's talking about Mr. Powell having the inside source
21 and Mr. Powell getting a call from another individual in terms
22 of payment itself. And I'm sure you've heard the recording or
23 read the transcript. He's talking about a number of
24 individuals. So it's not like, on the recording, the parts
25 that are relevant to the trial he's only talking about

1 Mr. Powell. But, again, certainly, when he's talking about
2 from 2:22 p.m. to about three o'clock, he's just talking about
3 him and Mr. Powell and the individual who he committed that
4 prior act of violence with who was on the phone and he said
5 wanted to --

6 THE COURT: Well, if the jury heard -- and this
7 follows up on this -- if the jury heard the tape saying, yeah,
8 I -- I -- I was going to shoot the victim and I told, blank,
9 you know, beep, to watch the guard, there's only two defendants
10 sitting in court. I think a jury would reasonably conclude the
11 beep relates to the other defendant.

12 MR. JULIEN: You could -- again, assuming that this is
13 where we land, you could offer a limiting instruction as well,
14 assuming that you rule that the evidence couldn't be admitted
15 against Mr. Powell, that, hey, members of the jury, what you're
16 about to hear would only be admissible against
17 Mr. Montgomery-Wilson, assuming we go down that path.

18 THE COURT: Are these natural life -- mandatory
19 natural life --

20 MR. JULIEN: They are.

21 THE COURT: Yeah, I'm -- I know limiting instructions
22 are, not to state a pun, but they're -- have limited utility.
23 I mean, we -- we give them, we expect the jury to listen to
24 them. In a case where the penalty is a mandatory natural life,
25 telling a jury to ignore something that's right in front of

1 them is like saying ignore the elephant in the room.

2 I -- I -- I think there's limited utility to a
3 limiting instruction in a criminal case where -- in a situation
4 like this. So I -- I understand, and it happens a lot where
5 you admit a relatively discrete piece of evidence, but this
6 tape if it -- I haven't listened to the tape, I just read the
7 transcripts, but I'm assuming it's pretty powerful as to
8 Mr. Montgomery-Wilson. And with two defendants in the
9 courtroom, it's going to be really hard for a jury not to
10 understand the person that is beeped out is the other guy
11 sitting in the courtroom.

12 MR. JULIEN: And I understand that that's what we
13 want. I'm just -- I'm -- I'm addressing your -- your
14 question --

15 THE COURT: Understood.

16 MR. JULIEN: -- that we would want to assess what the
17 ruling is --

18 THE COURT: Sure.

19 MR. JULIEN: -- and we can talk about what our options
20 are and hopefully --

21 THE COURT: Another question before you get to the
22 substance, and there's a few here I have. How long would this
23 trial be with both defendants? How long would the trial be
24 with each defendant separately?

25 MR. JULIEN: I think it's the same length, Your Honor.

1 So I think it only increases calling one additional witness,
2 the informant, and playing the relevant portions of the
3 recording in a trial against Mr. Montgomery-Wilson. And that
4 was a two-week estimate. And so a trial against Mr. Powell is
5 just -- that evidence is removed, but it's otherwise the same
6 presentation.

7 THE COURT: In light of my other trial schedules,
8 that's nothing, a two-week trial. If you're saying another --
9 and two two-month trials, that would be a lot of time, but two
10 weeks whether that tape -- two weeks for one defendant, two
11 weeks for the other, or two weeks joint.

12 MR. JULIEN: Correct.

13 THE COURT: So -- okay. Got it. Go ahead.

14 MR. JULIEN: So unless you have any other questions, I
15 would like to respond to -- to some of the arguments.

16 Your Honor, I think the fundamental problem -- there
17 are actually two fundamental problems with Mr. Powell's
18 position and arguments here is an overreliance on the *Lilly*
19 case. So *Crawford* was decided and changed what the analysis
20 is. So we're not talking about the reliability and all of
21 those things in terms of confrontation clause. *Crawford* says,
22 is it testimonial or is it not testimonial? Illustrate some
23 examples of what are testimonial, and it makes it clear that
24 that is an objective standard.

25 And the cases that we cite, the Seventh Circuit cases,

1 three in particular, *Watson*, *Davis v. Washington*, and the
2 *Volpendesto* case, all also make that clear. We're not talking
3 about the subjective state of mind in Mr. Montgomery making
4 these -- the statement or the subjective state of mind of the
5 informant making the recording. It's objectively when you look
6 at this, is the declarant making statements that are
7 testimonial, that, you know, would be used in trial. And what
8 *Watson*, *Washington*, and *Volpendesto* all say is that a statement
9 that's made unwittingly, unknowingly to a coconspirator in what
10 looks like a casual conversation, that's not testimonial. And
11 that's the example that we have here. As I said, there are two
12 fundamental problems. That's one.

13 The second relatedly is I think Powell has
14 characterized what has happened here as an interrogation, which
15 is what was at issue in *Lilly*, *Crawford*. But post-*Crawford*,
16 they haven't cited to you a case at -- and I think we've cited
17 to you a couple that support our position where in jail and
18 persons talking to a fellow inmate said -- or coconspirator,
19 what used to be a coconspirator, says something what's clearly
20 not a police interrogation and that that would be an
21 interrogation just because the person is an informant.

22 What we're talking about here between
23 Mr. Montgomery-Wilson talking to this informant, this is not an
24 interrogation. There's -- Mr. Montgomery-Wilson wouldn't have
25 said these things to him had he, you know, been in the

1 interrogation room.

2 THE COURT: No, of course not, right.

3 MR. JULIEN: He's saying these things against
4 interest, against his own interest because he doesn't think
5 that these things are going to be used against him at trial.
6 He would think --

7 THE COURT: Well, wouldn't the question -- the point
8 raised by defense is that he's saying it to enhance his
9 reputation for violence and then protect himself in jail. You
10 know, whether that's far-fetched or true, isn't that something
11 that the -- only a cross-examination of Mr. Montgomery-Wilson
12 would reveal?

13 MR. JULIEN: I think that that goes to the difference
14 between *Lilly* and what happened in *Crawford* and post-*Crawford*
15 in terms of the subjective state of mind of the declarant.

16 Now, I'll just say as a point of fact, Judge,
17 Mr. Montgomery-Wilson and this informant are both gang members.
18 You mentioned you haven't heard the recording, but when you
19 listen to it, this is an intense, you know, chest-pounding
20 conversation. These guys are laughing, cracking jokes. It's a
21 freewheeling conversation because they're familiar with each
22 other. They know some of the same people. This isn't, you
23 know, jailhouse puffery, I'm trying to intimidate him. It's
24 hey, they're reminiscing. And let me tell you about this
25 thing, let me tell you about this thing, let me tell you

1 about -- oh, let me tell you about this murder that we
2 committed -- right? -- in addition to another act of violence
3 that I committed the day before.

4 So I -- I -- I think getting into what's in
5 Montgomery-Wilson's state of mind is not an area that we should
6 be in based on the case law, which says you have to kind of
7 look at this objectively, not subjectively. But, again, just
8 as a point of fact, that's not what's happening when you listen
9 to this recording, Your Honor.

10 And so --

11 THE COURT: No, I need -- I need to listen to it,
12 you're correct.

13 MR. JULIEN: Yeah. The cases that we cite, I just
14 gave you those three, I think are directly on point. And so
15 one thing I want to underscore, and this is in -- I think in
16 the initial brief of Mr. Powell and the reply is this idea that
17 what *Washington, Davis* -- *Washington, Watson*, and *Volpendesto*
18 are not saying is that a statement is only not testimonial if
19 the person is a coconspirator. Because in those cases, the
20 person is not a coconspirator at the point where they're
21 recording --

22 THE COURT: Right.

23 MR. JULIEN: -- on --

24 THE COURT: Conspiracy was over.

25 MR. JULIEN: Right. Precisely.

1 So we think these cases are on point. We think
2 they're factually analogous to what happened here. We have not
3 located a case post-*Crawford* or post-*Watson*, which is 2008,
4 where the Seventh Circuit has said that the jailhouse
5 conversation, which is incriminating and incriminates another
6 person, is impermissible because it happens in that -- in that
7 scenario.

8 The defense, Mr. Powell, hasn't pointed Your Honor to
9 one, and we've been talking about this for a while, I think we
10 came in May when we talked about this briefing, so we think
11 we're on solid legal footing here in saying that these cases
12 and the analysis in these cases are what you should be looking
13 at in terms of whether this statement is testimonial or not.

14 THE COURT: Let's assume it's testimonial, you know,
15 you may have the better argument under the case law, at least,
16 I think it's a statement against interest, of course. No
17 rational person would make these statements, and the indicia of
18 reliability typically attaches the statements against interest,
19 especially when they're way against interest, like describing
20 how a person was executed.

21 Have you found cases that -- well, first, is it an
22 abuse of discretion standard on a Rule 14 grant and have you
23 found cases where a judge has abused this discretion by
24 granting a severance under Rule 14 where were I to do it under
25 these circumstances, there's a case out there saying what you

1 did is contrary to U.S. v. X?

2 MR. JULIEN: So no, we haven't found a case that
3 said -- well, so let me back up. It's an abuse of discretion
4 standard --

5 THE COURT: Right.

6 MR. JULIEN: -- and we have not found a case where it
7 would say it's an abuse of your discretion to -- to grant
8 severance.

9 On this point, though, there is one thing I want to
10 just -- on the fundamental fairness issue, and I just -- I use
11 this as a -- kind of an illustration. It's not the same thing,
12 but I think the idea that the statement shouldn't come in or
13 confession shouldn't come in just because Mr. Powell can't put
14 Mr. Montgomery-Wilson up on the stand and cross-examine him, I
15 think it's analogous to the situation where statements are
16 being offered that were made in furtherance of a conspiracy
17 under Rule 801, and that's not what this is. That's not the
18 basis that we're offering it, but it's the same idea.

19 You know, coconspirator makes a statement that's
20 incriminating and maybe it's a codefendant and you can't put
21 him on the stand and cross-examine him, but the statement still
22 comes in if it was made in furtherance of the conspiracy.

23 We have statements like that, not -- not the
24 confession, but in this case, the text messages back and forth
25 about the payment, we would offer those as statements in

1 furtherance of the conspiracy. So Mr. Montgomery-Wilson can't
2 put Mr. Powell on the stand and cross-examine him when he was
3 talking about payment from Individual A in the text, but that's
4 certainly relevant and it goes to the crux of what we're
5 talking about here.

6 So just because --

7 THE COURT: Well, but the -- the timing difference is
8 important, though, because --

9 MR. JULIEN: Sure.

10 THE COURT: -- statements during a conspiracy, whether
11 you get to cross-examine the maker of the statement or not, are
12 something well-recognized as an exception to the hearsay rule
13 under 801(d)(2)(E). But if you look at the Advisory Committee
14 Notes to Rule 14 all the way back to the 1966 amendment, it's
15 talking almost exactly like an -- about a situation like this.
16 And maybe it's -- well, go ahead.

17 MR. JULIEN: Yeah. So I -- just closing the loop on
18 that point, Your Honor, all I'm pointing out is the idea -- if
19 the basis is solely I can't cross-examine this person because
20 they said something that is incriminating to me, there -- I use
21 that as an analog.

22 THE COURT: Okay.

23 MR. JULIEN: I mean, just -- so on the Rule 14 joinder
24 severance, Your Honor, this crime was committed together and
25 there's lots of overlapping evidence, separate and apart from

1 the confession, so -- which I think is why the length of the
2 trial is going to be the same.

3 So text messages, you know, we're talking about both
4 defendants, and that's coming in I think in a trial against
5 both of them. The DNA, physical evidence, the scene, the
6 victim who survived, the security guard, is going to have to
7 come and testify at both trials. Cell tower evidence, all of
8 these things are coming in I think at both trials, and the
9 reason why is because they committed this crime together.

10 THE COURT: Would you be willing to try the case
11 without the tape, try -- try the two defendants together
12 without the tape?

13 MR. JULIEN: So, Your Honor, I -- I think the tape has
14 to come in and it's just a question of, you know, can we -- and
15 this is one of the things we want to assess depending on what
16 the ruling is, can we redact it or not, will we want to redact
17 it or not. Even if we say we will redact it, will you -- do
18 you think that a limiting instruction is a sufficient safeguard
19 for the jury? I think we want to talk about that depending on
20 what your ruling is. But I think in a trial against
21 Mr. Montgomery-Wilson at the very least, we want this recording
22 and we want to use it.

23 Now --

24 THE COURT: All right.

25 MR. JULIEN: -- one thing that Ms. Armour said in

1 talking about all of the other evidence that we have -- and we
2 do have a lot of evidence and we think it corroborates the
3 recording, but this is a singular piece of evidence in the
4 sense that we don't have another example, other than the text
5 messages, of a defendant acknowledging he committed the murder.
6 And -- and not only that he did it, but why he did it, which
7 provides color to the text messages and everything they did
8 that day.

9 So this is -- I mean, we can put the case on and we'll
10 prove our case, I think, in addition to this recording, but
11 this is not -- you know, it's not a situation where, which I
12 think Ms. Armour was suggesting, we have all of this other
13 evidence and so it's unduly prejudicial because you don't need
14 it because you got all this other stuff.

15 THE COURT: What is your other evidence on Powell if
16 the tape is out?

17 MR. JULIEN: So the physical evidence. We have his
18 DNA on -- fingerprint on the cup. We have the video. We have
19 cell site. We have text messages from him that we're going to
20 say -- argue support our view of that other evidence. You
21 know, they're together. Their cell site evidence puts them
22 together at a residence or at an area that's consistent with
23 being at Powell's residence, traveling in tandem over to the
24 site of the murder, sitting in that parking lot, you know,
25 departing after the murder, all of these things, physical

1 evidence, we think would be evidence against Mr. Powell.

2 THE COURT: Is anyone going to identify him as being
3 on that tape? Is the face clear enough?

4 MR. JULIEN: I don't think so, Your Honor, and it's
5 one of those things we're just going to have to argue in
6 closing, but they're wearing masks, so no one's going to come
7 in and say --

8 THE COURT: Oh, all right.

9 MR. JULIEN: -- that's Mr. Powell.

10 THE COURT: I couldn't tell they were wearing masks so
11 that probably speaks to the issue of could anyone identify
12 their face anyway.

13 MR. JULIEN: Yeah.

14 THE COURT: Who was supposed to collect the money?
15 Was it Powell?

16 MR. JULIEN: So that's what they're talking about in
17 the text messages. I think what the evidence will show -- and
18 this is one of the reasons why we want to introduce the
19 reported -- Mr. Montgomery-Wilson makes it clear that he was
20 going to collect the money from Individual A and Mr. Powell was
21 hounding him about it. Has he given you the money?

22 THE COURT: Okay. Okay. All right. Well, I --
23 anything else?

24 MR. JULIEN: Nothing else, Your Honor.

25 THE COURT: Okay. Any response?

1 MS. ARMOUR: Just briefly.

2 Just taking a -- a couple of the points that the
3 government hit. Regarding the timing of *Lilly* versus *Crawford*,
4 and we set this forth in our -- our reply and I believe also in
5 our opening brief, but *Crawford* explicitly says regarding the
6 testimonial point, the Sixth Amendment is not solely concerned
7 with testimonial hearsay, period. Full stop. And that's at
8 541 U.S. 30 -- 36 at page 53.

9 And then at page 69 of *Crawford*, it -- in it -- the
10 majority opinion says -- and says repeatedly throughout the
11 opinion that they are not providing, quote, a comprehensive
12 definition of testimonial -- of what testimonial is. And I
13 think that's important for that -- just to answer that context.

14 We have *Lilly*, which speaks to this other issue. But
15 if you're going to say that *Crawford* subsumes *Lilly* and somehow
16 *Lilly* is not relevant or good law anymore, nevertheless,
17 *Crawford* on its own basis says testimonial is not the end-all
18 be-all of this analysis, and nor are they trying to set forth
19 what is testimonial and what is not testimonial. They are
20 providing what we would say are minimal boundaries outlining
21 certain categories that they firmly believe are testimonial,
22 but they are not ruling out what is not testimonial.

23 With regard to the point about *Volpendesto* and *Watson*
24 that the conspiracy is over at that point, our point is not
25 that it somehow met, you know, a coconspirator -- coconspirator

1 exception, but that the fact that they were confederates, the
2 fact that they were mutually engaged in the criminal activity
3 is the relevant factual point. So we -- we just wanted to
4 highlight that.

5 And then with regard to the analogy made to the
6 coconspirator exception -- and I understand that that's, you
7 know, just an analogy, I think the -- there could not be two
8 different exceptions to hearsay. In the coconspirator
9 exception, and as Your Honor points out and the government
10 acknowledges, there is this component that is -- creates this
11 reliability, which is the in furtherance component, and that is
12 something that the use of this particular exception to hearsay,
13 the use against the statement against interest, *Lilly* talks
14 extensively whether it -- and we believe it remains good law --
15 but talks extensively about the history behind and the concerns
16 behind the inherent unreliability to those kinds of statements
17 as applied to a third party, not the maker. And so I -- I
18 just -- while I appreciate the attempt to find an analogy, I
19 just -- I do not think that it is -- it's appropriate. It's --
20 it's as applied in this case.

21 And then, you know, I think -- I think what's
22 important here is, like, of course this is not a, you know,
23 traditional interrogation, but it certainly is an interrogation
24 within like a plain meaning of the understanding, which is the
25 government's agent, this inmate, was in fact trying to elicit

1 information and questioning to illicit the information.

2 So this is not just a passive hearing. This is not
3 just Mr., you know, Montgomery-Wilson being wired up in his
4 cell and just speaking to himself. These statements were
5 elicited. And there is a government component to the eliciting
6 of this statement that I think cannot be lost.

7 And for all the reasons that we outlined previously,
8 we do believe that the prejudice is extraordinary, that there
9 is no remedy, limiting instruction, cross-examination, no
10 remedy that could be given in this case that would erase the
11 taint from the jury's mind of hearing a statement like this
12 with Mr. Powell sitting at the table and not automatically
13 assign the blame to him.

14 THE COURT: All right. Thank you.

15 MR. JODREY: Your Honor, just one -- one just quick
16 thing --

17 THE COURT: Sure, Mr. Jodrey, go ahead.

18 MR. JODREY: On this -- keeps coming back to *Lilly*. I
19 just -- I just want to highlight one thing. *Lilly* dealt with
20 police interrogations, so they're talking about reliability.
21 In addition to *Crawford* saying we're not going there anymore,
22 we're just doing it as a testimonial or not, *Lilly* dealt with a
23 police interrogation.

24 The crux of this testimonial issue, as the
25 Supreme Court and the Seventh Circuit has said, is was it made

1 under the circumstances that would lead a witness to believe
2 that what I'm saying is going to be used in court. Right?
3 That's -- that's what that's about. And there's a reason when
4 you look at the defendant's reply brief, they basically ask
5 this Court to, like, overturn *Watson*, right?

6 They're like *Watson* -- Seventh Circuit got it wrong in
7 *Watson*. That's not what this Court's role is, right? Like,
8 *Watson* says: A statement unwittingly made to a confidential
9 informant and recorded by the government is not testimonial for
10 confrontation clause purposes.

11 That's exactly what we have here. And that's why they
12 have to say, well, Judge, we disagree with *Watson*. That's
13 the -- that's the circuit law on this, and so it -- it is
14 clearly not testimonial. And so the second question, then, is,
15 does it fall under a different -- if it's an out-of-court
16 statement -- right? -- does it come under the -- the statement
17 against interest? This Court has just said, clearly it comes
18 in as a statement against interest. That's where the
19 reliability comes in. People don't admit to committing
20 homicides they didn't commit. That's where the reliability
21 comes in with respect to what he's saying, and that's where the
22 corroboration comes in. And they say, well, there's almost too
23 much corroboration.

24 Well, that -- they're conceding the other factor in
25 considering whether is this -- this kind of goes to the

1 fairness issue -- is it reliable? Yes. People wouldn't say
2 this if it weren't true. He's implicating himself in a
3 homicide. And what he's saying is corroborate up and down as
4 being true.

5 And just like Mr. Julien said, this idea that they're
6 essentially putting forward, which is, well, if I can't
7 cross-examine him, therefore it's unfair. Evidence -- evidence
8 against coconspirators and codefendants get admitted without
9 the ability to cross-examine all the time. So that -- that
10 can't be the thing just because they can't cross-examine him.
11 All -- it's not testimonial, so *Crawford* doesn't apply. It
12 clearly is a statement against interest, so it's a -- it falls
13 under a hearsay exception, right? So the only question is, is
14 it somehow unfairly prejudicial? And it's not unfairly
15 prejudicial. It is a statement that is admissible.

16 THE COURT: Well, we still -- you, not we, you still
17 have to deal with Rule 14, which gives me the ability, if I
18 believe it's appropriate, if the joinder of offenses in an
19 indictment -- I'm paraphrasing -- appears to prejudice a
20 defendant, the Court may order separate trials of counts, sever
21 the defendants' trials.

22 And I -- you know, I think the -- you both raise good
23 arguments about whether it's testimonial or not and what the
24 effect of various -- of *Watson* and other cases is, but,
25 ultimately, if -- if we go on down a decision tree and find

1 that it's testimonial and can be admitted as a statement
2 against interest, is there anything that prevents me under
3 Rule 14 if I believe that it would be -- prejudice a defendant
4 if that's -- if you want to admit that statement to sever the
5 defendants?

6 And, you know, the rule allows me to do it, but -- and
7 it's an abuse of discretion standard. Are there cases where a
8 judge grants the severance, under these circumstances or
9 anything analogous, where presumably the government has to take
10 an appeal at the time, take an interlocutory appeal or a
11 mandamus of some kind to get that issue resolved, which is why
12 there's probably not a lot of case law out there? Is there
13 anything out there that if I determine a severance is
14 appropriate under Rule 14 that I'm acting -- I'm abusing my
15 discretion?

16 MR. JODREY: I -- I -- I -- like you said, I'm not
17 aware of a case on -- on that point. But I would just note in
18 *Watson* -- and I can't pronounce the name right, *Volpendesto* --
19 I mean, essentially, that's the argument is like, hey, this
20 shouldn't have come in, these defendants if it were --
21 right? -- it wasn't raised in that context given the way it
22 played out -- right? -- but the Court was essentially being
23 question -- asked, like, hey, this shouldn't have come in.

24 And the courts and the Seventh Circuit, when this
25 question has come up, have been, yeah, no, it absolutely should

1 go in. It was admissible. So it's -- it's the reverse end of
2 what you're talking about. And so is it prejudicial? Sure.
3 But is it unfairly prejudicial? No.

4 And when it comes to the joinder or severance issues,
5 like, would this evidence be admissible against Mr. Powell in a
6 separate trial? And we -- our -- we would say yes. Under the
7 Rules of Evidence, I mean, this is a statement that is coming
8 in as a clear well established hearsay exception. And again,
9 just because you can't cross-examine him, that's not the
10 end-all be-all here.

11 The analogy again is just like that happens a lot in a
12 different -- when we talk about, you know, Santiago and things
13 coming in, it's -- it's coming in under a different rule, but
14 the idea -- the -- the sort of the fairness argument that's
15 being made here applies, which is like, well, that seems unfair
16 I can't -- I can't cross-examine -- I mean, in -- in
17 coconspirator statements, sometimes you don't even know who the
18 declarant is and it still comes in, so long as the government
19 can establish that the statements made by someone who's a part
20 of the conspiracy.

21 So even in cases where not only can I not
22 cross-examine the person, I don't even know who the person is.
23 It's just a statement made as part of the conspiracy. That's
24 essentially the argument. This is unfair because I can't
25 cross-examine him, right? It's not -- I mean, like -- again,

1 that kind of goes back to the -- the rationale for the hearsay
2 exception. Is it reliable? And it is.

3 THE COURT: Well -- okay. Okay.

4 Well, I will listen to the tape, which I should before
5 I make a ruling on the case. My preliminary thinking, though,
6 is that I would grant a severance under Rule 14. I -- I do
7 believe, absent my rereading the briefs, rereading the cases,
8 and listening to the tape, as opposed to just reading the
9 transcript, that the joinder of the offenses would appear to
10 prejudice the defendant.

11 The Advisory Committee notes talks about a situation
12 just like this, even though it's an old Advisory Committee
13 note. If the government -- if that will get you started on
14 whether you're going to redact it so you can play it at a joint
15 trial, I'd work on that and provide me with the -- at least the
16 transcript, probably easier than cutting and pasting a tape --
17 or clipping the tape, but a transcript of how you would admit
18 it in a joint trial where it wouldn't prejudice Mr. Powell,
19 keeping in mind he's the only guy sitting there with -- with
20 Mr. Montgomery-Wilson. And that's what we'll do. But
21 that's -- if -- if -- that's my preliminary thoughts.

22 And I -- I can't get past the idea that I view this as
23 unfairly prejudicial to Powell in a -- and if you were to offer
24 that tape in a joint -- in a severed trial against Powell, I
25 would likely not let it in. Certainly let it in as to

1 Montgomery-Wilson. He's the guy on the tape. There's no
2 question, of course, it comes in as to him. But if I sever the
3 case and you attempted to put that in, which you should, you
4 attempt to, but I would likely not allow it in in Mr. Powell's
5 trial, which is the reason I'm granting the -- likely granting
6 the severance, or preliminarily granting it.

7 So if you -- I recognize, Mr. Jodrey, the -- couple of
8 those cases are kind of the flip of the question of whether it
9 could have been admitted in a joint trial if there's any --
10 unlikely event, but if there's any Rule 14 analysis that is out
11 there that either side can point to for me, I'm happy to look
12 at it. That's really what I'm confronting, a Rule 14 question.

13 But I think the question of whether it's testimonial
14 or not is a close enough question where I don't have to get
15 into that as much as looking at Rule 14, which I think is the
16 ultimate rule dealing with the prejudice to a defendant, which
17 is what I'm required to analyze in determining whether it's
18 allowed in in a joint trial.

19 Okay. Did we ever set a trial date in this case? I
20 thought I did.

21 MR. JULIEN: We did, Your Honor. I think it's just as
22 to Mr. Montgomery-Wilson, July 6th of next year, 2026. Or is
23 it the 13th? I think it's July --

24 MS. ARMOUR: I believe it's July 6th. And I believe
25 that defense counsel for Mr. Montgomery-Wilson had a slight

1 conflict with that date, so I believe that was actually set as
2 to Mr. Powell. I could be wrong.

3 MR. SPIELFOGEL: I don't believe we set which client
4 would be going to trial first.

5 THE COURT: There is a trial on July 6th.

6 MR. JULIEN: There is a trial date, and time is
7 excluded through July 6th of next year.

8 THE COURT: To both defendants, because there hasn't
9 been a severance.

10 MR. SPIELFOGEL: Correct.

11 THE COURT: Okay. All right. Then you'll need a
12 ruling from me. I'd start working on the redaction, if that's
13 your intent to offer it in a single trial.

14 MR. JODREY: Will do.

15 THE COURT: And your anticipation whether it's a
16 single trial or a joint trial is two weeks?

17 MR. JODREY: That's correct.

18 THE COURT: Okay.

19 All right. Very good. Anything else from the
20 government?

21 MR. JULIEN: Yes, Your Honor. Just in terms of
22 process, and we know you have some -- some obligations this
23 fall --

24 THE COURT: Yeah.

25 MR. JULIEN: -- we think it would still be wise to get

1 back in here maybe next month, sooner rather than later, just
2 given, you know, trial calendars. It sounds like maybe there's
3 an issue with the July 6th date, and I think it's better to
4 know that sooner --

5 THE COURT: Okay.

6 MR. JULIEN: -- rather than later, depending on what
7 your ruling is. If there are going to be two trials, to put
8 those dates on the calendar. So would it make sense to come in
9 before your trialapalooza kicks off next --

10 THE COURT: Yeah, that starts September 4th. So maybe
11 a -- Emily, the third week of August if we have time.

12 In court with defendants present, I assume.

13 MR. SPIELFOGEL: That would be fine, Your Honor.

14 THE CLERK: Just taking a look here.

15 MS. ARMOUR: Yes. Ms. Blaine is unavailable, but I am
16 during the third week, which is that -- the week of the 18th?

17 THE COURT: Yeah. I think --

18 MR. GOLDBERG: Your Honor, may I --

19 THE COURT: Make sure you're in front of a mic, Mr. --

20 MR. GOLDBERG: May I suggest the first half of that
21 week, if possible?

22 THE COURT: Yeah. And there's nothing magic about
23 that week, but -- what's that, the week of August 18th, or are
24 we talking -- yeah, I'm out at the Seventh Circuit conference
25 which we're supposed to attend is the first two days.

1 Or how about August 25th, that week? Is that better
2 for everyone?

3 MR. JULIEN: Works for the government.

4 MR. SPIELFOGEL: That's fine, Your Honor.

5 THE COURT: How about for --

6 MS. ARMOUR: I -- I am -- I am out of the office and
7 Ms. Blaine has a sentencing that day.

8 THE COURT: Oh, I meant that week.

9 MS. BLAINE: I could do the later half of that week.
10 The first part of that week is pretty packed.

11 THE COURT: How's the 28th?

12 MR. SPIELFOGEL: And I have a sentencing on the 28th,
13 Your Honor.

14 THE COURT: What time?

15 MR. SPIELFOGEL: Oh, actually, you know what, that
16 sentencing's been moved. Never mind.

17 THE COURT: Okay.

18 MR. GOLDBERG: Your -- Your Honor, I -- I have a
19 conflict on the 28th in the morning, but the afternoon is
20 available, and any other day that week works for me.

21 THE COURT: Let's go off the record.

22 (Off the record.)

23 THE COURT: Back on the record.

24 Emily, what date can we then set it for?

25 THE CLERK: August 28th at 2:00 p.m.

1 THE COURT: Okay. And defendants will appear.

2 You want your clients here, correct?

3 MR. SPIELFOGEL: Yes, Your Honor.

4 MS. ARMOUR: Yes.

5 THE COURT: Okay. We'll have the defendants ordered
6 up to come in at two o'clock that day.

7 If you don't have a written ruling by that day, I'll
8 certainly give you an oral ruling, or at least something before
9 the 28th -- or on the 28th.

10 Okay. Very good. Then that'll be it.

11 Anything else from the government?

12 MR. JULIEN: No, Your Honor.

13 THE COURT: Defense?

14 MS. ARMOUR: No.

15 MR. SPIELFOGEL: No, Your Honor.

16 THE COURT: Okay. Thank you.

17 MULTIPLE SPEAKERS: Thank you.

18 THE COURT: And we don't need the -- I have one
19 question for the attorneys. Defendants don't need to be here.

20 (Defendants exit.)

21 THE COURT: We're off the record.

22 (Off the record.)

23 (Concluded at 11:56 a.m.)

24

25

* * * * *

I certify that the foregoing is a correct transcript of
the record of proceedings in the above-entitled matter.

/s/ Elia E. Carrión

1st of September, 2025

Elia E. Carrión, CSR, RPR, CRR, CRC
Official Court Reporter